IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 621 OF 2005 .
WITH
WRIT PETITION NO. 619 OF 2005.

M/s German Remedies Ltd. .. Petitioners.

V/s.

Dy. Commissioner of Income-Tax. .. Respondent.

Shri Ajay Singh for the petitioner.

Shri A.S. Rao for the respondent.

CORAM : V.C.DAGA AND J.P. DEVADHAR, JJ.

DATED : 28.10.2005.

ORAL JUDGMENT (Per V.C.Daga,J.)

. These petitions, filed under Article 226 of the Constitution of India, are directed against the notices dated 15.9.2003, issued under section 148 of the Income Tax Act, 1961 ('Act' for short), seeking to re-open completed assessments of the petitioner-assessee for the assessment years 1997-98 and 1998-99, along with orders dated 18.2.2005 passed by the Deputy Commissioner of Income-tax, Range 6(3),Mumbai, rejecting the objections taken by the petitioners to reopening their completed assessments.

2. Parties to the petition are same; issue involved is identical; challenges to the impugned orders are common; so this common judgment shall dispose of both petitions.

. The facts necessary to appreciate rival contentions are taken from Writ Petition No. 619/2005, wherein assessment year involved is 1998-99.

The Facts:

3. The petitioners are the public Limited Company engaged in the business of manufacturing pharmaceutical products and other formulations. The return of income for the Assessment Year 1998 -1999 was filed on 29.11.1998. The last date of the assessment year was 31.3.1998..

4. The assessment order was passed under section 143 (3) of the Act on 7.1.2000. Last date for issue of notice under section 148(1) as per proviso to section 147 was 31.3.2003, whereas notice under section 148(1) came to be issued on 15.9.2003; which came to be served on the petitioners on 8.10.2003.

5. The petitioners responded to the notice under protest and filed a letter seeking the reasons for issuing the notice to reopen the assessment. In spite of specific request, respondent No.1 did not disclose reasons. Hence petitioners were required

to file writ petition being Writ Petition No. 3065 of 2004. On being noticed, respondent- department appeared and disclosed reasons vide their affidavit dated 17.1.2005 for reopening assessment under section 148 of the Act. In view of the disclosure of reasons; petitioners were permitted to file objections, within two weeks from the date of the order dated 18.1.2005, with the respondents to object to reopen the assessment. The petition came to be disposed of. The reasons disclosed are as under:

"(i) Expenses on interest, royalty, consultancy and analytic fees in the foreign currency were allowed though there is no evidence on record to show that tax had been deducted before remittance of the same. U/s 40(a) of the Act, the payments in foreign currency are allowed in the year in which tax has been deducted.

(ii) Central excise duty and customs duty payable on finished goods for the year is not taken into account in valuing closing stock resulting into under assessment."

6. The objections to the reasons recorded were decided by the respondent No.1 vide its order dated 18.2.2005; whereby objections raised came to be

rejected.

7. Being aggrieved by the aforesaid action of respondent No.1, petitioners have invoked writ jurisdiction of this Court to challenge their action.

8. On being noticed, respondents appeared in this petition and filed their counter affidavit and tried to justify their action.

Submissions:

9. The Learned Counsel appearing for the petitioners submits that notice issued under section 148 dated 15.9.2003 for A.Y. 1998-99 by respondent No.1 is barred by limitation since it has been issued beyond the statutory period of 4 years from the end of the relevant assessment year. According to the learned Counsel for the petitioners period of 4 years commences on 31.3.2003 and as such impugned notice issued under section 147 seeking to reopen for both the assessment years 1997-98 and 1998-99 is bad in law and without jurisdiction.

10. The learned Counsel further submits that returns were subject to scrutiny and the assessment under sec. 143(3) as such notice notice u/s 148(1) cannot be issued merely on change of opinion. No

fresh facts have been brought on record to issue the notice in question, as such, impugned notice issued under section 148 seeking to reopen the assessment for years 1998-99 is without jurisdiction and bad in law.

11. The Learned Counsel for the petitioners further submits that the approval granted by the C.I.T, Mumbai, suffers from non-application of mind. According to him, approval was granted in a most casual manner. He placed reliance on the judgment of the Delhi High Court in the case of United Electrical Co.P.Ltd vs. CIT (2002) 258 ITR 317 (Del), wherein the Delhi High Court held that the power vested in the Commissioner under section 151 to grant or not to grant approval to the Assessing Officer to reopen an assessment is coupled with a duty. The Commissioner was duty bound to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. That power cannot be exercised casually, in a routine and perfunctory manner.

12. The Learned Counsel further submits that the reasons recorded do not attribute any omission or inadvertence on the part of the petitioners to make true and full disclosure of its income. In his submission, no material is available on record to

justify formation of belief that the income of the petitioners had escaped assessment.

13. The learned Counsel further submits that full information with respect to the tax deducted at source from the payments made to various parties towards its expenditure was disclosed in the return of income for the TDS in Form No. 27 which was filed on 22.6.1998; whereas details of party and payments made were also disclosed in the return of income. The Tax Audit Report accompanied with the Annual Return filed with the return clearly mentioned that all the obligations with respect to TDS were properly satisfied and complied with. He also submits that notice under sec. 148 of the Act has been issued contrary to the circular issued by the CBDT No. 549 dated 31.3.1989.

14. The Learned Counsel for the petitioners further submits that second reason for issuing the notice under sec. 148(1) is with respect to valuation of closing stock with Modvat (Excise and custom duty paid). The petitioners submit that this very issue was considered in detail in the assessment order dated 21.12.2000. Reference to provisions of sec. 145A is to be found also in the assessment order. He further submits that on this very same ground the petitioners had preferred an

appeal for A.Y. 1998-99; which was allowed by the First Appellate Authority and also the Tribunal based on the decision of this Court in the case of C.I.T. vs. Indo Nippon vs. which was subsequently affirmed by the Apex Court in the judgment reported in (2003) 261 ITR 275. Petitioners have placed reliance on various judgments of this Court as well as of the Apex Court in the cases of (1) Caprihens India Ltd. vs. Tarun Seem- (2004) 266 ITR 566 (Bom), (2) CIT vs. Farmer France- (2004) 264 ITR 566 (SC), (3) Hindustan Lever Ltd vs.R.B. Wadkar, ACIT (2004) 268 ITR 339 (Bom), (4) Grindwell Norton Ltd. vs. ACIT (2004) 267 ITR 673 (Bom)

Per Contra:

15. The Learned Counsel appearing for the Revenue submits that notice under section 148 of the Act was issued after recording reasons for reopening of the assessment. He further submits that section 149 (1)(b) empowers the respondents to reopen the assessment with prior approval of the Commissioner of Income Tax under section 151(1) of the Act. He further submits that there was no evidence on record to show that TDS had been deducted after making payment under section 40 (a) of the Act. He further submits that since the assessee had failed

to make full and true disclosure of relevant material the assessment remained under section 147 of the Act. He further submits that the respondent applied provisions of section 147 which empowers reopening of assessment completed under section 142(3) after recording reasons. The reasons recorded for reopening assessment were already furnished and, therefore, action of the respondent was in accordance with law. He further submits that the reasons furnished were objected by the petitioner and same were decided in accordance with law and, therefore, petition is liable to be dismissed.

16. The Learned Counsel for the Revenue also pressed into service two affidavits; one filed by Shri Samir Takriwal, Deputy Commissioner of Income-Tax, Circle 6(3), Mumbai, who had jurisdiction over the petitioners. He has stated on oath that he had prepared proposal for opening of assessment year 1998-99 and since 4 years had already elapsed, he did obtain prior approval from the Commissioner of Income-tax to reopen assessment. According to him, he had prepared the proposal and he himself had gone to the office of the Commissioner of Income tax on 15.9.2003 with file for taking his prior approval.

17. The second affidavit is that of Shri Tarkeshwar Singh, who at the relevant time, was working as Commissioner of Income-tax, City-6. He has stated on oath that 15.9.2003, the Assistant Commissioner of Income Tax / Assessing Officer in the petitioner's case had approached his office for taking prior approval to the proposal for re-opening the assessment of the petitioners u/s 148 for the A.Y. 1998-99. He, in the affidavit states that after discussing the matter with the Assistant Commissioner, he was satisfied that a case has been made out for reopening the assessment as such granted approval to the proposal on the same day i.e. 15.9.2003.

18. In rejoinder,the petitioner submits that the contention raised with respect of provisions of section 149(1)(b) and 151 is not correct. He submits that the approval granted is without application of mind and the same appears to have been granted in routine and perfunctory manner. He further reiterated that respondent has not given any reply to the petitioner's specific submissions that during the course of original assessment the issue of valuation of closing stock was examined in detail in the light o the ratio laid down by the Apex Court in the case of British Paints India Ltd. (1991) (188) ITR 44 (SC), as such the power to reopen

exercised by the Revenue is bad and illegal.

Consideration:

19. Having heard rival parties and having examined averments made in the petition and the counter affidavits, one has to reach to the conclusion that power to reopen has been exercised on unsustainable reasons. It is not in dispute that the return of income filed by the petitioner was accompanied by audit report, profit and loss accounts and tax audit report under sec. 44AB of the Act. The record reveals that true and full information with respect to TDS from the payments made to various parties towards expenditure was disclosed in the return for TDS in Form No.27 on 22nd June 1998m, which is produced on record at Ex.J alongwith Challan at page 155. Details of the various parties and payments were enclosed to the return of income which clearly showed that all obligations with respect to TDS were properly complied with. Petitioner vide letter dated 27.11.1998 had also submitted statement of TDS and certificate as such, according to the petitioners, the first reason pressed into service to reopen is unsustainable.

20. So far as second reason for issuing notice under sec. 148(1) with respect to valuation of closing stock with Modvat (excise and custom duty paid) is concerned, it may be noted that the inventory is required to be valued either at cost or market price whichever is lower. According to this principle, assessee had valued its closing stock at cost. The cost of purchase consists of purchase price including duties and taxes, freight inwards and other expenditure attributable to acquisition and bringing the stock in the present situation and location as on the date of valuation. The excise duty and sales tax paid on the purchase of raw material forms part of the cost and is required to be taken into consideration for the purpose of valuation not closing stock as laid down by the Apex Court in the case of British Paints India (supra).

21. The very same judgment has been followed in the assessment order dated 21.12.2000 (Ex.D). Assessment order also refers to section 145 (A). The same order related to A.Y. 1998-99 which was allowed by the first appellate authority was also before the Income Tax Appellate Tribunal, based on the decision of this Court in the case of Indo Nippon (supra).

22. In the above circumstances, the reasons

mentioned are unsustainable. Those reasons do not lead to formation of belief that income has escaped assessment for a.y. 1998-99.

23. Having said so, it is necessary to consider 2 more submissions advanced on behalf of the petitioners. Firstly, the impugned notice is bared by limitation since it was issued beyond period of 4 years from the end of relevant assessment year. Failure on the part of petitioners to disclose full and true material has not been alleged. In this case, power to reopen has been exercised after expiry of 4 years from the end of relevant assessment year to which they relate. In the circumstances, the impugned notice having been issued beyond 4 years from the last date of the of relevant assessment year without alleging any failure to disclose full and true material facts is liable to be set aside.

24. It is not in dispute that the Assessing Officer on 15.9.2003 had himaself carried file to the Commissioner of Income tax and on the very same day, rather same moment in the presence of the Assessing Officer, the Commissioner of Income tax granted approval. As a matter of fact, while granting approval it was obligatory on his part to verify whether there was any failure on the part of the assessee to disclose full and true relevant

facts in the return of inocome filed for the assessment of income of that assessment year. It was also obligatory on the part of the Commissioner to consider whether or not power to reopen is being invoked within a period of 4 years from the end of the assessment year to which they relate. None of these aspects have been considered by him which is sufficient to justify the contention raised by the petitioner that the approval granted suffers from non-application of mind . In the above view of the matter, the impugned notices and consequently the order justifying reasons recorded are unsustainable.

The same are liable to be quashed and set aside.

25. In the result, the petitions are allowed.

Rule made absolute in each petition with no order as

to costs.

(J.P. DEVADHAR, J.) (V.C. DAGA,J)